

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RICHARD OWENS,) 1:12-cv-00154-SKO-HC
)
Petitioner,) ORDER TO PETITIONER TO SHOW CAUSE
) IN THIRTY (30) DAYS WHY THE
) PETITION SHOULD NOT BE DISMISSED
v.) FOR PETITIONER'S FAILURE TO
) EXHAUST STATE REMEDIES
WARDEN DONNELLY,) (Doc. 1)
)
Respondent.)
)
_____)

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 303. Pending before the Court is Petitioner's petition, which was filed in this Court on February 2, 2012.

I. Screening the Petition

Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts (Habeas Rules) requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must summarily dismiss a petition "[i]f it plainly appears from the petition and any attached exhibits that the

1 petitioner is not entitled to relief in the district court...."

2 Habeas Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir.

3 1990); see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.

4 1990). Habeas Rule 2(c) requires that a petition 1) specify all

5 grounds of relief available to the Petitioner; 2) state the facts

6 supporting each ground; and 3) state the relief requested.

7 Notice pleading is not sufficient; rather, the petition must

8 state facts that point to a real possibility of constitutional

9 error. Rule 4, Advisory Committee Notes, 1976 Adoption;

10 O'Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge v.

11 Allison, 431 U.S. 63, 75 n. 7 (1977)). Allegations in a petition

12 that are vague, conclusory, or palpably incredible are subject to

13 summary dismissal. Hendricks v. Vasquez, 908 F.2d 490, 491 (9th

14 Cir. 1990).

15 Further, the Court may dismiss a petition for writ of habeas

16 corpus either on its own motion under Habeas Rule 4, pursuant to

17 the respondent's motion to dismiss, or after an answer to the

18 petition has been filed. Advisory Committee Notes to Habeas Rule

19 8, 1976 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43

20 (9th Cir. 2001).

21 II. Exhaustion of State Court Remedies

22 A petitioner who is in state custody and wishes to challenge

23 collaterally a conviction by a petition for writ of habeas corpus

24 must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1).

25 The exhaustion doctrine is based on comity to the state court and

26 gives the state court the initial opportunity to correct the

27 state's alleged constitutional deprivations. Coleman v.

28 Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509,

1 518 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1162-63 (9th Cir.
2 1988).

3 A petitioner can satisfy the exhaustion requirement by
4 providing the highest state court with the necessary jurisdiction
5 a full and fair opportunity to consider each claim before
6 presenting it to the federal court, and demonstrating that no
7 state remedy remains available. Picard v. Connor, 404 U.S. 270,
8 275-76 (1971); Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir.
9 1996). A federal court will find that the highest state court
10 was given a full and fair opportunity to hear a claim if the
11 petitioner has presented the highest state court with the claim's
12 factual and legal basis. Duncan v. Henry, 513 U.S. 364, 365
13 (1995) (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 9-10
14 (1992), superceded by statute as stated in Williams v. Taylor,
15 529 U.S. 362 (2000) (factual basis).

16 Additionally, the petitioner must have specifically told the
17 state court that he was raising a federal constitutional claim.
18 Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669
19 (9th Cir. 2000), amended, 247 F.3d 904 (9th Cir. 2001); Hiivala
20 v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999); Keating v. Hood,
21 133 F.3d 1240, 1241 (9th Cir. 1998). In Duncan, the United
22 States Supreme Court reiterated the rule as follows:

23 In Picard v. Connor, 404 U.S. 270, 275...(1971),
24 we said that exhaustion of state remedies requires that
25 petitioners "fairly presen[t]" federal claims to the
26 state courts in order to give the State the
27 "'opportunity to pass upon and correct' alleged
28 violations of the prisoners' federal rights" (some
internal quotation marks omitted). If state courts are
to be given the opportunity to correct alleged violations
of prisoners' federal rights, they must surely be
alerted to the fact that the prisoners are asserting
claims under the United States Constitution. If a

1 habeas petitioner wishes to claim that an evidentiary
2 ruling at a state court trial denied him the due
3 process of law guaranteed by the Fourteenth Amendment,
he must say so, not only in federal court, but in state
court.

4 Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule
5 further in Lyons v. Crawford, 232 F.3d 666, 668-69 (9th Cir.
6 2000), as amended by Lyons v. Crawford, 247 F.3d 904, 904-05 (9th
7 Cir. 2001), stating:

8 Our rule is that a state prisoner has not "fairly
9 presented" (and thus exhausted) his federal claims
in state court unless he specifically indicated to
that court that those claims were based on federal law.
10 See, Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir.
2000). Since the Supreme Court's decision in Duncan,
11 this court has held that the petitioner must make the
federal basis of the claim explicit either by citing
12 federal law or the decisions of federal courts, even
if the federal basis is "self-evident," Gatlin v. Madding,
13 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v.
Harless, 459 U.S. 4, 7... (1982)), or the underlying
14 claim would be decided under state law on the same
considerations that would control resolution of the claim
15 on federal grounds, see, e.g., Hiivala v. Wood, 195
F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon,
16 88 F.3d 828, 830-31 (9th Cir. 1996); Crotts, 73 F.3d
at 865.

17 ...

18 In Johnson, we explained that the petitioner must alert
the state court to the fact that the relevant claim is a
19 federal one without regard to how similar the state and
federal standards for reviewing the claim may be or how
obvious the violation of federal law is.

20 Lyons v. Crawford, 232 F.3d 666, 668-69 (9th Cir. 2000), as
21 amended by Lyons v. Crawford, 247 F.3d 904, 904-05 (9th Cir.
22 2001).

23 Where none of a petitioner's claims has been presented to
24 the highest state court as required by the exhaustion doctrine,
25 the Court must dismiss the petition. Raspberry v. Garcia, 448
26 F.3d 1150, 1154 (9th Cir. 2006); Jiminez v. Rice, 276 F.3d 478,
27 481 (9th Cir. 2001). The authority of a court to hold a mixed
28

1 petition in abeyance pending exhaustion of the unexhausted claims
2 has not been extended to petitions that contain no exhausted
3 claims. Raspberry, 448 F.3d at 1154.

4 Where some claims are exhausted and others are not (i.e., a
5 "mixed" petition), the Court must dismiss the petition without
6 prejudice to give Petitioner an opportunity to exhaust the
7 unexhausted claims if he can do so. Rose, 455 U.S. at 510, 521-
8 22; Calderon v. United States Dist. Court (Gordon), 107 F.3d 756,
9 760 (9th Cir. 1997), en banc, cert. denied, 118 S.Ct. 265 (1997);
10 Greenawalt v. Stewart, 105 F.3d 1268, 1273 (9th Cir. 1997),
11 cert. denied, 117 S.Ct. 1794 (1997). However, the Court must
12 give a petitioner an opportunity to amend a mixed petition to
13 delete the unexhausted claims and permit review of properly
14 exhausted claims. Rose v. Lundy, 455 U.S. at 520; Calderon v.
15 United States Dist. Ct. (Taylor), 134 F.3d 981, 986 (9th Cir.
16 1998), cert. denied, 525 U.S. 920 (1998); James v. Giles, 221
17 F.3d 1074, 1077 (9th Cir. 2000).

18 Here, Petitioner alleges that he is an inmate of the
19 California State Prison at Lancaster, California, serving a
20 sentence of twenty-five years to life imposed in 2009 in the
21 Kings County Superior Court for assault by means of great bodily
22 injury in violation of Cal. Pen. Code § 4501. (Pet. 1.)

23 Petitioner alleges two claims in the petition: 1) he was
24 denied his Sixth Amendment right to self-representation; and 2)
25 his right to the effective assistance of trial counsel was
26 violated because trial counsel failed to interview the victim
27 before trial. (Pet. 4.)

28 Petitioner alleged that he raised his claim concerning self-

1 representation on appeal and before the California Supreme Court.
2 (Pet. 2.) However, Petitioner did not allege that he presented
3 his claim concerning the ineffective assistance of counsel to the
4 California Supreme Court. Further, he indicated that other than
5 a direct appeal, he had not previously filed any petitions or
6 applications with respect to the judgment in question. It,
7 therefore, appears that the self-representation issue was
8 presented to the highest state court, but it does not appear that
9 state court remedies were exhausted as to the issue of
10 ineffective assistance of counsel.

11 Accordingly, upon review of the instant petition for writ of
12 habeas corpus, it appears that Petitioner has not presented at
13 least one of his claims to the California Supreme Court. If
14 Petitioner has not presented all of his claims to the California
15 Supreme Court, the Court cannot proceed to the merits of those
16 claims. 28 U.S.C. § 2254(b)(1). It is possible, however, that
17 Petitioner has presented all his claims to the California Supreme
18 Court but has simply neglected to inform this Court.

19 Thus, Petitioner must inform the Court if his claim
20 concerning the ineffective assistance of counsel has been
21 presented to the California Supreme Court, and if possible,
22 provide the Court with a copy of the petition filed in the
23 California Supreme Court, along with a copy of any ruling made by
24 the California Supreme Court. Without knowing what claims have
25 been presented to the California Supreme Court, the Court is
26 unable to proceed to the merits of the petition.

27 III. Order to Show Cause

28 Accordingly, Petitioner is ORDERED to show cause why the

1 petition should not be dismissed for Petitioner's failure to
2 exhaust state remedies as to all his claims. Petitioner is
3 ORDERED to inform the Court within thirty (30) days of the date
4 of service of this order whether or not his claim concerning
5 ineffective assistance of counsel has been presented to the
6 California Supreme Court.

7 Petitioner is forewarned that failure to follow this order
8 will result in dismissal of the petition pursuant to Local Rule
9 110.

10
11 IT IS SO ORDERED.

12 **Dated: February 20, 2012**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE